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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Sec. 202 12

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STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

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vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Stewart-Jordan Distributing Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 29, 1954 (R. 148).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court (R. 109-116) are not reported in the Federal Supplement. Two opinions are found in the Court of Appeals, Chief Judge Hutcheson dissenting. The majority opinion of two judges (R. 131-138) and the dissenting opinion of Chief Judge Hutcheson (R. 138-147) are re-

ported in 210 F. 2d at 427 and 432, respectively. Nine printed copies of the record having been furnished, reference is made to the pages of the record in which the District Court's findings and conclusions and the opinions of the Court of Appeals may be found, instead of including them in the Appendix.

JURISDICTION.

Th judgment of the Court of Appeals (R. 148) was entered on January 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

Whether if—

An employee works as a helper on a local wholesale delivery truck, from which goods are sold and delivered to retailers within the state. These goods, received from outside the state, previously had come to rest in the wholesaler's warehouse and had become a part of the mass of property in the state. Incident to such sales and his delivery of the goods from the truck to the retailers, the helper picks up from the retailers and loads into the delivery truck empty containers of the returnable type. At the end of the day he unloads them at the wholesale warehouse of his employer. The employer there collects these empties and others similarly picked up by other helpers and inspects, replaces unsuitable ones, inventories and stores them and, though not required to do so, later ships the empty containers outside the state. The helpers have no part in this collection, inspection, inventorying, storing or shipping.

1. Are these helpers subject to the Fair Labor Standards Act as "engaged in commerce", *i. e.*, interstate commerce?

2. When does a journey in interstate commerce begin?

3. Is the law as to when interstate commerce commences still the same as that first laid down in *Coe* v. *Errol*, 116 U. S. 517, and followed by this Court in all subsequent cases?

4. Are these helpers engaged in a local business such as Congress, in enacting the Fair Labor Standards Act, intended to leave to the protection of the states?

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, are Section 6(a)(1) (minimum wage), Section 11(c) (records), and Sections 15(a)(2) and 15(a)(5) (prohibiting violations of Sections 6 and 11, respectively) and are set forth in the Appendix, *infra*, pp. 17, 18.

STATEMENT.

Respondent, Secretary of Labor, brought suit to enjoin petitioner, Stewart-Jordan Distributing Company, Inc., from allegedly violating, as to helpers employed on local delivery trucks, the minimum wage and record keeping provisions of the Fair Labor Standard Act of 1938, as amended (29 U. S. C. Supp. 206, 211(c); Sections 6(a)(1) and 11(c), *infra*, p. 17; R. 1-5, 109). Petitioner was in compliance as to all the other employees claimed to be subject to the Act[1] (R. 32, 37, 109).

Whether the Act applies to the helpers depends on whether they are "engaged in commerce," respondent admitting that the helpers are not "engaged in production of good for commerce" (210 F. 2d 427, 430; R. 135; 29 U. S. C. Supp. 206).

1. The allegations in the complaint as to violations of the child labor provisions of the Act were stricken by respondent Secretary of Labor before trial (R.109).

Petitioner is a wholesale distributor of beer, ale and wine to the local retailer trade in Florida within the vicinity of Jacksonville (R. 17, 110). These commodities are obtained from manufacturers in other states by rail in carload lots (R. 17, 93, 110) and are unloaded by warehousemen from the railroad car into petitioner's warehouse (R. 45). Later, from the stock in the warehouse, the beer, ale and wine are loaded into local retail delivery trucks, from which driver salesmen sell and deliver such merchandise to local retail customers[2] (R. 19; Finding 4, R. 110) in competition with other wholesalers of the same kind of products. Each of the helpers, the employees here involved, is employed to assist a driver salesman on a delivery truck in connection with these sales and deliveries (R. 48, 75, 82; Finding 5, R. 111).

It is not disputed that the beer, ale and wine come to rest in petitioner's warehouse under no pre-existing order or identification for any particular customer and become a part of the mass of property within the state or that the sale and delivery thereof to retailers is purely intrastate commerce (Dissenting opinion, R. 141, 142, 143; 210 F. 2d 427 at 435, 436).

Beer and ale come in three types of containers, *i. e.*, cans, non-returnable bottles and returnable bottles (R. 17-18, 110). Wine bottles are not returnable (R. 60). Of the beer and ale received and sold, approximately 82% is in non-returnable containers—cans or non-returnable bottles—and only 18% is in returnable bottles[3] In purchasing

2. On one (R. 20) of the seven routes of driver salesmen (R. 36), on one or at the most three occasions a month, the Atlantic Coast Line Railroad Company, Seaboard Airline Railroad Company and Pullman Company may specially order some beer (R. 120). This involves only one route and only one driver salesman and one helper.

3. An average of four cars per month of returnable bottles are received to an average total of 22 cars of all beer and ale (R. 93, 103). Counting wine, which is in non-returnable bottles, the percentage of returnable containers to the total of all con-

the beer and ale, petitioner also purchases the returnable bottles (R. 18, 94), which the breweries agree to repurchase if the petitioner chooses to sell and ship them to the breweries (R. 94). The petitioner is not required to do so and may dispose of them as it sees fit (R. 94).

Incident to and as part of the sale and delivery of beer, ale and wine, the helpers pick up empty returnable containers from local retailers, inspect them to some extent on the retailer's premises and, on returning to petitioner's warehouse at the end of the day, unload the empties from the retail delivery trucks and place them just inside the warehouse door (R. 97, 49, 56, 75).

In the warehouse petitioner gathers together empties similarly picked up from all parts of the area which it serves. There they are inspected. Broken or chipped bottles, non-returnable bottles, coca cola bottles and other unsuitable bottles are removed, placed in separate cases and replaced with suitable returnable bottles. A check is also made for accuracy as to the number returned. They are then moved to the rear of the warehouse and stored. Though not required to do so, petitioner later ships the empty containers to a brewery outside the state (R. 48, 62, 63, 67, 97). All this work in the warehouse, including the loading of railroad cars, is performed by warehousemen and the helpers do none of it (R. 48, 62, 67, 97).

The empties shipped to a brewery outside the state amount to an average of three or four carloads a month, as compared with the receipt of an average of 22 cars a month of beer and ale in both returnable and non-returnable containers and the receipt of as much as 36 carloads a month (R. 93).

The District Court concluded that the interstate journey

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tainers would be less. Dollar wise the cost of returnable containers is approximately $6,200.00 per month, as compared with total monthly purchases of beer and ale alone of approximately $132,000.00 (R. 95).

of the empties outside the State of Florida commenced when they were picked up at the retailer's place of business by the helpers and therefore the helpers were engaged in interstate commerce and were covered by the Fair Labor Standards Act (Conclusions of Law 2, 3 and 4, R. 115). The Trial Court by its judgment (Appendix, *infra*, p. 18; R. 116-118) enjoined petitioner from violating the minimum wage and record keeping provisions of the Act.

On appeal the Court of Appeals for the Fifth Circuit in a two to one decision affirmed the judgment of the District Court, Chief Judge Hutcheson dissenting (R. 148). The judgment is also set forth in the Appendix, *infra*, p. 20. The majority concluded that the interstate journey of the empties to the brewery outside the state commenced when they were picked up from the retailer and therefore the helpers were "engaged in commerce" and subject to the Act (R. 136; 210 F. 2d 427, 431). Chief Judge Hutcheson dissented on the grounds that (1) the interstate journey of the empties did not commence until they were loaded from the warehouse into the railroad car for shipment to the brewery outside the state and (2) the helpers are part of local business activities such as Congress, in enacting the Fair Labor Standards Act, intended to leave to the protection of the states (R. 138-147; 210 F. 2d 427, 432-436).

In the petition for writ of certiorari, petitioner accepts the findings and conclusions of the District Court and Court of Appeals that the helpers are its employees, but contends that these helpers are not subject to the Fair Labor Standards Act.

JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction of this case under Section 17 of the Fair Labor Standards Act (29 U. S. C. 217), which is set forth in the Appendix, *infra*, p. 18.

REASONS FOR GRANTING WRIT.

I.

This Petition Presents to This Court for the First Time the Question of When Interstate Commerce Commences for the Purpose of Determining Coverage Under the Fair Labor Standards Act.

This Court has determined when interstate commerce ends, within the meaning of the phrase "engaged in commerce" as used in the Fair Labor Standards Act. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. But this Court has never ruled or been called upon to rule as to when, under the Act, interstate commerce begins.

Prior to this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, the Wage and Hour Administrator's enforcement policy was that the established concepts of when interstate commerce ended no longer existed and, although goods received from outside the state came to rest in the wholesaler's warehouse under no pre-existing order and for no customer's particular use, that this did not terminate the interstate journey but that it continued at least until the goods had been sold and delivered to a retailer and possibly even until they reached the consumer. In the Jacksonville Paper Co. case this Court denied and put an end to that contention in re-affirming the established principles and concepts as to when the interstate journey of goods from outside the state ends in the wholesaler's warehouse and under what circumstances it does not end at that point.

Now the Administrator seeks to establish for the Fair Labor Standards Act new principles for determining when

an interstate journey commences. For the same reason that this Court granted certiorari in the Jacksonville Paper Co. case and set at rest doubts created by the Wage and Hour Administrator as to when interstate commerce ends under the Act, so this Court should grant certiorari in this case to place at rest doubts created by the Wage and Hour Administrator and by the decision of the Court of Appeals as to when interstate commerce begins.

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of This Court on the Important Question as to When Interstate Commerce Commences.

The two majority Judges of the Court of Appeals based their decision (210 F. 2d 427, 431; R. 136) on the holding in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, that once goods are in interstate commerce, as in the case of goods procured from without the state, "if the halt in the movement of the goods is a convenient, intermediate step in the process of getting them to their final destination, they remain 'in commerce' until they reach these points," *i. e.*, the customers.

If, as Chief Judge Hutcheson states in his dissenting opinion (210 F. 2d 427, 436; R. 142), the cases of empty returnable bottles "were already in the stream of commerce," we would "agree that the temporary unloading and depositing of the empties at the warehouse did not divert them from that stream." But in the instant case this begs the question, which is whether the cases of empty returnable bottles entered interstate commerce when they were picked up at the retailer's place of business or when they were loaded into a railroad car for shipment outside the state. As held in *Coe* v. *Errol*, 116 U. S. 517, and the

subsequent decisions of this Court, the question of when interstate commerce commences "does not present the predicament of goods in course of transportation through a state, although detained for a time within the state * * *."

The majority of the Court of Appeals, in disregard of and without referring to *Coe v. Errol*, 116 U. S. 517, and the subsequent cases of this Court as to when the interstate journey commences, concluded that since, when the empties were picked up by petitioner's drivers and helpers, the intended destination was beyond the warehouse and outside the state, the helpers were engaged in interstate commerce.

As stated by Chief Judge Hutcheson in his dissenting opinion (210 F. 2d 427, 436; R. 144) in *Coe* v. *Errol*, 116 U. S. 517, and "in all cases decided since which deal with the question when does the interstate journey commence, the courts have held without wavering that the interstate journey of goods does not commence until they have started upon such transportation in a continuous route or journey to another state or have been committed to a common carrier for transportation to another state. The transportation of goods to a depot or other place where the journey is to begin is not a part of the journey but is only preliminary and is performed for the purpose of putting the property in a state of preparation and readiness for transportation. The intention to ship the goods outside the state and partial preparation to do so are of no consequence." As stated in *Coe* v. *Errol*, 116 U. S. 517:

> "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place outside of the state or committed to the custody of the carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? * * * The

carrying of them in cars or other vehicles * * * to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation."

In this case the returnable empties are picked up throughout the entire area served by petitioner and transported to its warehouse as the central point for assembly and preparation for the shipment outside the state. There these empties are carefully inspected and improper, broken or chipped bottles are replaced with bottles of the right kind and in good condition. They are inventoried and are not shipped until a sufficient quantity has been so collected.

These principles of *Coe* v. *Errol*, for determining when transportation in interstate commerce commences, have been followed by this Court ever since without wavering and have also been applied in determining when foreign commerce commences. *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21; *Southern Pacific Co.* v. *State of Arizona*, 249 U. S. 472, 477; *Empresa Siderurgica S. A.* v. *County of Merced, California* (1949), 337 U. S. 154; *Richfield Oil Co.* v. *State Board of Equalization* (1946), 329 U. S. 69; *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40.

The last two cases cited are of particular import as they arose under the Federal Employers' Liability Act, coverage under that Act being based on "engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations" (45 U. S. C. 51). As stated by this Court in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 131:

"* * * Both (Fair Labor Standards Act and Federal Employers' Liability Act) are aimed at protecting commerce from injury through adjustment of the master-servant relationship * * * We see no persuasive

reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases (under Federal Employers' Liability Act) should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

The holdings in these two cases under the Federal Employers' Liability Act are set out below on this page under reason III.

III.

If the Decision of the Court of Appeals Is Not Reviewed by This Court, It Will Leave in Effect One Rule as to When Interstate Commerce Commences for the Purpose of Determining Coverage Under the Fair Labor Standards Act and Another and Conflicting Rule for Determining the Same Question Under Other Important Federal Acts, Coverage Under Which Is Based Upon the Person or Activity Being in Interstate Commerce.

Coverage under the Federal Employers' Liability Act is based on "engaging in commerce between any of the several states or territories * * * or any of the states and territories and foreign nation or nations" (45 U. S. C. 51). Under that Act and in *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 and *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40, in reliance on *Coe* v. *Errol*, it was held that the movement within the state of logs by a logging company's railroad from various places within its timber land to a central point, from which they were sold and shipped outside the state, was not in interstate commerce and therefore the brakeman on the railroad was not under that act.

The Merchant Marine Act provides that "No merchandise shall be transported by water, or by land and water,

* * * between points in the United States * * * embraced within coast-wise laws * * * in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States * * *" (46 U. S. C. 883). In 1953 the Court of Appeals for the Seventh Circuit relied on *Coe* v. *Errol*, 116 U. S. 517, in holding that a Canadian tug, in pulling or pushing logs into a towing boom so that they could be towed coast-wise from Minnesota to Wisconsin by an American vessel, was not engaged in "transportation for interstate commerce" but "was merely forming a bundle or package of logs to be carried on an interstate journey," which journey could not begin until the logs were in the towing boom. *United States* v. *1500 Cords, etc.*, 204 F. 2d 760, 763-764.

Although apparently the specific question of when interstate commerce begins has not yet arisen under the Motor Carrier Act, as no reported decisions have been found, this question will arise under that Act as it applies "to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *" (49 U. S. C. 302).

IV.

The Question of When Interstate Commerce Commences for the Purpose of the Fair Labor Standards Act Is One of Wide Application and Import.

Not only the thousands of wholesalers of malt beverages throughout the forty-eight states, District of Columbia and territories but other wholesalers as well are vitally interested in the question of when interstate commerce commences for the purpose of determining coverage under the Act. So are other employers, who not only return but also in the original instance ship goods in interstate commerce.

The answer to the question of when under the Act interstate commerce begins applies to many situations besides transportation of goods. Equally important in these other situations is the answer as to whether the previously established principles for determining this question are applicable or whether a new set of principles apply under the Fair Labor Standards Act. As just one example, whether the pick-up from sender and the carrying by messenger boy to the telegraph office of messages for a person in another state constitutes being "engaged in commerce" was not passed on in *Lenroot* v. *Western Union Telegraph Co.*, 323 U. S. 490.

V.

The Helpers on the Local Delivery Trucks Are Engaged in a Local Business Which Congress, in Enacting the Fair Labor Standards Act, Intended to Leave to the Protection of the States. In This Regard the Decision of the Court of Appeals Conflicts With the Decisions of This Court.

Congress, in enacting the Fair Labor Standards Act, plainly indicated its purpose to leave local business to the protection of the states. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570; *10 East 40th Building, Inc.* v. *Callus*, 325 U. S. 578. In the Jacksonville Paper Co. case this Court held as not covered by the Act those employees whose duties concerned only distribution after the interstate journey of the goods from outside the state had terminated at wholesaler's warehouse. The only difference between those employees and the helpers of petitioner is that in the Jacksonville Paper Co. opinion there is no mention as to whether the delivery employees also picked up and returned to the wholesaler's warehouse goods which the employer later shipped outside the state.

Does that difference affect the local business nature of petitioner's local distribution or of the helpers' essentially local activities? We think not.

The important and principal activity and the purpose of petitioner's business is to sell and distribute. That sale is to local retail customers. As incident to and in order to make the sale, it is necessary to take the empty containers off the hands of the retail customer. Therefore, as part of their sale and distribution duties and incidental thereto, the driver salesman and helpers pick up the empties from retailer's place of business (R. 19). In bringing the empties back to the warehouse on the delivery trucks, along with the unsold full containers, the helpers are doing nothing more than they would be doing if they had not picked up the empties. The volume of empties picked up, as compared with the full containers delivered, is very small—only 18% of beer and ale being sold in returnable bottles (R. 93, 95, 100).

Furthermore, there is a distinct separation between the helper's duties in returning empties to the warehouse, after which the helpers have nothing to do with the empties, and the subsequent handling of the empties in the warehouses and the shipment of them to a brewery outside the state. The duties and activities of the helper are purely intrastate and local in nature and separated from the preparation of empties for and the shipment of them outside the state. In common understanding and conception their activities are purely local. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 230-232; *10 East 40th Building, Inc.* v. *Callus*, 325 U. S. 578, 582-583.

After quoting from this Court's statement in the Jacksonville Paper Co. case that "Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states," Chief Judge Hutcheson

stated in his dissenting opinion (21 F. 2d 427, 433, 436; R. 140-142):

> "Applying these principles to this case * * * it seems perfectly clear to me that it is to completely misapprehend either the effect of the undisputed facts or of the meaning and effect of the opinion in the Jacksonville case or of both to held, as the majority does, that the appellant's employees involved in this case, in the course of their purely intrastate solicitation, sale and delivery of beer, pick up some of the empties for return to the warehouse and because the warehouse, after assorting and assembling enough of them to make a carload, ships them in interstate commerce, these employees are engaged in commerce.
>
> "In the first place, this holding, that the picking up of a small part of the empties for return to the warehouse brings these men, whose activities are essentially intrastate, into interstate commerce, makes the tail (and a very little tail at that attached to a very large dog) wag the dog."

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 23, 1954.

Appendix.

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C. Supp. V, 201, *et seq.*

MINIMUM WAGES.

SEC. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than 75 cents an hour.

INVESTIGATIONS, INSPECTIONS AND RECORDS.

SECTION 11. • • •

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

• • • • •

PROHIBITED ACTS.

SEC. 15 (a). After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person

• • • • •

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

INJUNCTION PROCEEDINGS.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction for cause shown, to restrain violations of section 15; *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

DISTRICT COURT JUDGMENT.

The judgment of the District Court, filed October 27, 1952, is found at pp. 116-118 of the record and, eliminating the heading of the case, reads as follows:

The above-styled cause came on for trial before this Court, sitting without a jury, on the 6th day of October, 1952, plaintiff and defendants appearing by counsel. The complaint was dismissed as to defendant Joe Boutwell for want of service of process upon him. Upon considerations of the pleadings filed herein and the evidence adduced at the trial, and the cause having been submitted to the Court on the entire record therein and the arguments of counsel for the respec-

tive parties, and findings of fact and conclusions of law having been made and filed herein,

Now, therefore, sufficient reason therefor appearing and upon the findings of fact and conclusions of law made and filed herein, it is

Ordered, Adjudged and Decreed that the defendants Stewart-Jordan Distributing Company, Inc., Carrol Fordham, Elwood Ogilvie, William A. Orange, Dan Logue and Dixie Midkiff, their officers, agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, 52 Stat. 1060, as amended by 63 Stat. 910; U. S. C. Ti. 29, Sec. 201, *et seq.*), hereinafter referred to as the Act, in any of the following manners:

(1) The defendants shall not, contrary to Section 6 of the Act, pay any of their employees who are engaged in interstate commerce, as defined by the Act, wages at rates less than 75 cents an hour.

(2) The defendants shall not fail to make, keep and preserve adequate and accurate records of their employees and of the wages, hours and other conditions and practices of employment maintained by them, as described by the regulations of the Administrator, issued and from time to time amended, pursuant to Section 11(c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

It is further ordered that costs be, and they hereby are, taxed against the defendants, for which execution may issue.

Dated this 27th day of October, 1952.

BRYAN SIMPSON,
United States District Judge.

COURT OF APPEALS JUDGMENT.

The judgment of the Court of Appeals, being an extract from the minutes of the Court of January 29, 1954, is found on page 148 of the record and, after eliminating the heading of the case, reads as follows:

> This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;
>
> On consideration whereof, It is now here ordered and adjudged by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.
>
> "Hutcheson, Chief Judge, dissents."

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In the Supreme Court of the United States

October Term, 1953

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.
Petitioner

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 109-116) are unreported. The opinion of the Court of Appeals (R. 131-147), with the dissenting opinion, is reported at 210 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals (R. 148) was entered on January 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether employees of a wholesale beer distributor, engaged in collecting and transporting to their employer's warehouse beer bottles and cases destined to specific out-of-state breweries, and specifically so marked for the out-of-state destination, are "engaged in commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U. S. C. (Supp. V), 201 *et seq.* are:

SEC. 3. As used in this Act—

* * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than 75 cents an hour.

* * *

SEC. 11. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner (and other defendants who did not appeal from the District Court judgment) from violating the minimum wage and record keeping provisions of the Fair Labor Standards Act of 1938 (Sections 6 and 11(c)) in the employment of truck driver helpers or "strikers."[1]

Petitioner is engaged at Jacksonville, Florida, in the wholesale distribution of beer, ale, and wine (Fdg. 1, R. 109-110), all of which is obtained from

---

[1] The other defendants consisted of the driver-salesman employed by petitioner and claimed by it to be the sole employers of the employees involved in violations of the Act. The two lower courts held against petitioner on this issue (R. 114, 137-138), and petitioner now "accepts the findings and conclusions * * * that the helpers are its employees" (Petition for Certiorari, p. 6).

sources outside the State of Florida (Fdg. 2, R. 110). The "strikers" in question work with the truck driver-salesmen who are employed by petitioner to make sales and deliveries to regular customers along regular routes, and to pick up and return to petitioner's warehouse all beer bottles and cases of the re-usable type (Fdg. 4, 5, 8, R. 110-111).

Beer and ale is shipped into Jacksonville by rail in carload lots, petitioner receiving approximately 22 carloads per month (Fdg. 3, R. 110). About one-fourth of the total beer and ale handled by petitioner comes in bottles and cases of the re-usable type (*id.*). These re-usable containers are purchased by petitioner from the out-of-state breweries at three cents a bottle plus 12 cents for the case (apart from the price of the contents) (R. 18), pursuant to a "set agreement with them that they will buy back all the empties we care to send back to them" (R. 94). Only two breweries are involved, Pabst Blue Ribbon of Peoria, Illinois, and Burger of Cincinnati, Ohio (Fdg. 2, R. 110). Practically all of the returns are to the Pabst company which uses brown beer bottles and cases marked with its Blue Ribbon name.

Though petitioner is under no compulsion to return the reusable bottles and cases to the out-of-state breweries, its vice-president and general manager testified that it gathers them "for the pur-

pose of sending them back" (R. 94). The return shipments are made by rail and in carload lots (about 2,000 cases to a car) at the rate of approximately one carload a week (Fdg. 7, R. 111). The dollar value of these shipments is approximately $6,720.00 a month (R. 95).

The "strikers" ride on the delivery trucks with the driver-salesmen. Their duties include unloading the required number of cases of beer and ale at each customer's place of business and also loading onto the truck the empty containers which have accumulated there. Before picking up the "empties" they first carefully check each case which is marked with the name of the out-of-state brewery to ascertain that it is full and contains only bottles of the returnable type. (Fdg. 5, R. 111; Majority Opinion, R. 132-133.) Upon returning to the warehouse they unload these cases of "empties" from the trucks and stack them against the warehouse wall at a place designated by the warehouse foreman (Fdg. 5, R. 111; Majority Opin., R. 133). The "strikers" and driver-salesmen pick up and return to the warehouse approximately 2,000 cases of empty bottles each week (Fdg. 7, R. 111). Subsequently all of these returnable bottles are moved to the back of the warehouse by warehouse employees where they are again checked to remove any remaining broken or unsuitable bottles (Fdg. 6, R. 111). As stated above, approximately

once a week the "empties" are loaded into a railroad car and shipped back to the out-of-state breweries.

During the period in controversy the "strikers" worked at least 10 hours a day and were paid a daily rate of $5.00 which was later raised to $6.00 (Fdg. 16, R. 114). Since October 7, 1950, petitioner has failed to make, keep and preserve any records of the names, addresses, dates of birth, hours of work or rates of pay with respect to the "strikers" (Fdg. 17, R. 114).

Both courts below held that the Act was applicable and that petitioner should be enjoined from further violations. The district court held that "in picking up, loading on delivery trucks, returning to the warehouse empty beer containers which are intended for and which are subsequently shipped to breweries located outside the state of Florida," the strikers "are engaged in interstate commerce within the meaning of the Fair Labor Standards Act" (R. 115). This holding was affirmed by the court of appeals, in a two-to-one decision, on the authority of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564.

ARGUMENT

The decision of the court of appeals correctly applies the principles of this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. It is not in conflict with the decision of any other United States court of appeals, and further review of it is unnecessary.

1. In the *Jacksonville Paper* case, goods destined to a specific out-of-state customer were held to be continuously "in commerce" within the meaning of the Fair Labor Standards Act, despite a temporary stop at a warehouse where they were unloaded and reloaded for "subsequent movement * * * to their intended destination." 317 U.S. at 567. "[I]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." *Id.* at 568. This was held to be the case with respect to goods brought to the warehouse "pursuant to a preexisting contract or understanding" for an intended destination to a customer beyond the warehouse. *Id.* at 568-569.

It is indisputable in the instant case that when the cases of bottles are picked up and transported by petitioner's drivers and helpers, their intended destination is beyond the warehouse to the out-of-state brewery "pursuant to a preexisting contract or understanding" with that brewery. It is also indisputable that the halt at the warehouse, which admittedly serves "as the central point for assembly and preparation for the shipment outside the state" (Petition for Certiorari, p. 10), is merely "a convenient intermediate step" in the process of getting the bottles to their final destination. There is thus "a practical continuity of move-

ment" of the bottles from the moment they are picked up by the drivers and helpers, on through the warehouse, and until they reach their final destination.

While the *Jacksonville Paper* case dealt with the end of the movement, whereas the instant case is concerned with the beginning, the same principles are equally applicable where there is the requisite integration and "practical continuity of movement." *United States* v. *Capital Transit Co.*, 325 U.S. 357, rehearing denied, 325 U.S. 896, reaffirmed in 338 U.S. 286; *Airlines Transp.* v. *Tobin*, 198 F. 2d 249 (C.A. 4); *Rockton & Rion Railroad* v. *Walling*, 146 F. 2d 111 (C.A. 4), certiorari denied, 324 U.S. 880; *Republic Pictures Corporation* v. *Kapler*, 151 F. 2d 543 (C.A. 8), affirmed, 327 U.S. 757, rehearing denied, 327 U.S. 817.

2. The *Jacksonville Paper* decision also disposes of petitioner's contention that the Act does not apply to the "strikers" because the work of gathering "empties" and transporting them to the warehouse is performed in connection with petitioner's "local business" of "local distribution." (Pet. 13-14.) The branch warehouses involved in *Jacksonville Paper* were also engaged in "local distribution," and the "bulk of the merchandise" which passed through them was found to be no "different from goods acquired and held by a local merchant for local disposition." 317 U.S. at 566, 570. But this Court specifically held that: "The fact that all of respondent's business is not shown

to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra* [316 U.S. 517], p. 524. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act." *Id.* at 571-572.

Plainly the duties of the employees here involved with reference to the cases of empty beer bottles were "substantial." They regularly and daily picked them up, transported them and unloaded them from their trucks and stacked them against the warehouse (Fdg. 5, R. 111).

3. Petitioner's assertion that the lower court's decision is in conflict with *Coe* v. *Errol,* 116 U.S. 517, and other cases based on it, is without merit. (Pet. 8-11.) None of those cases arose under the Fair Labor Standards Act. Most of them deal with the power of a state to tax goods in the initial stages of preparation or transportation toward a possible interstate destination, and "decisions such as those * * * are not particularly helpful in determining the scope of the Act. *Kirschbaum Co.* v. *Walling, supra,* pp. 520-21; *Walling* v. *Jacksonville Paper Co., supra.*" *Overstreet* v. *North Shore Corp.,* 318 U.S. 125, 132.

The two Federal Employers' Liability Act cases and the one Merchant Marine Act case cited by petitioner are also inapplicable. (Pet. 10.) All

three are based on *Coe* v. *Errol, supra.* Moreover, as to the Employers' Liability Act cases, this Court's decision in *McLeod* v. *Threlkeld,* 319 U.S. 491, cautions against applying them uncritically to Fair Labor Standards Act problems. "The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act." 319 U.S. at 495.

CONCLUSION

The decision below is correct and there is no conflict. Nor does the question as presented on the record in this case appear to be of sufficient substance or general importance to warrant review by this Court. Accordingly we oppose the issuance of the writ.

Respectfully submitted.

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May 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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THE CHURCHILL-HARRIS PRINTING COMPANY, CHICAGO

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REPLY BRIEF OF PETITIONER.

ARGUMENT.

Respondent's Arguments Bring In to Clear Focus the Importance of the Questions Herein Presented and That They Warrant Review by This Court.

Although attempting to minimize the importance of the questions involved in this case as an argument for the Court not granting the Writ of Certiorari, the arguments of Respondent sum up to the contention that a different concept and different principles exist under the Fair Labor

Standards Act for determining what is "in commerce"—in particular as to when interstate commerce begins—than apply under other federal acts in which coverage is dependent upon an employee or an activity being "in commerce" and under other decisions of this Court as to what constitutes interstate commerce.

(1) Respondent argues (Respondent's Brief, Point 3, Pages 9-10) that, since *Coe* v. *Errol*, 116 U. S. 517[1] and *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36 and *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40, did not arise under the Fair Labor Standards Act, the holdings in these cases as to when an interstate journey commences are not applicable to the instant case. The latter two cases arose under the Federal Employers' Liability Act, prior to the 1939 amendment, and when the act "applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce'." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 128.

The question raised by Respondent's argument is: In determining whether an employee is "engaged in commerce" for the purpose of coverage under the Fair Labor Standards Act, are there different principles and a different concept of what constitutes interstate commerce than there is under the Federal Employers' Liability Act in determining whether an employee is "in commerce"?

In *Overstreet* v. *North Shore Corporation*, 318 U. S. 125-128 this Court in determining whether an employee was engaged in an activity so closely related to interstate transportation as to be "in commerce," said: "A practical test of what 'engaged in interstate commerce' means has been evolved in the cases arising under the Federal Employers' Liability Act (45 U. S. C. 51, *et seq.*, 45 U. S.

1. For other cases following *Coe* v. *Errol* see page 10 of Petition for Certiorari.

C. A. 51, *et seq.*)" before the 1939 amendment. In *McLeod v. Threlkeld*, 319 U. S. 491, though disagreeing as to whether a certain case under the Federal Employers' Liability Act had been subsequently nullified by a later decision of the Court under that act, both the majority and dissenting members of the Court agreed that, as stated in the majority opinion on page 495, "* * * the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employment 'in commerce' under the Fair Labor Standards Act."

Respondent apparently does not deny but accepts this Court's holding as to the applicability of cases under the Federal Employers' Liability Act, prior to the 1939 amendment, so far as concerns a determination of whether an employee is engaged in an activity so closely related to interstate transportation as to be engaged in such interstate transportation or commerce. Yet Respondent argues that this Court's holdings as to when interstate transportation commences for purpose of determining whether an employee is in such commerce under the Federal Employers' Liability Act, prior to 1939 amendment (*McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40), do not apply in determining when an interstate transportation or journey begins for the purpose of determining whether an employee is "engaged in commerce" under the Fair Labor Standards Act.

Do the cases arising under the Federal Employers' Liability Act, prior to the 1939 amendment, apply in determining whether an employee's activities are so closely related to interstate transportation that the employee is "engaged in commerce" under the Fair Labor Standards Act but such cases do not apply in determining when in-

terstate transportation and commerce begins for the purpose of coverage under the Fair Labor Standards Act?

(2) Respondent relies entirely on *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (Respondent's Brief, p. 6), to sustain the judgment of the Court of Appeals and the majority opinion. A brief statement of the holding in that case brings into focus the questions raised by Respondent's position in this regard.

In the *Jacksonville Paper Co.* case goods were received by a wholesaler from manufacturers outside of the State. There was no question but that the goods when delivered to the wholesaler were in interstate commerce. No question was involved as to when interstate commerce begins. The question was whether the interstate journey ended after these goods from outside the State had been received by the wholesaler in his warehouse and whether the employees engaged thereafter in handling and delivering these goods were engaged in interstate commerce. This Court held that: (a) Goods purchased from without the State to fill special orders of customers and goods similarly purchased from without the State imprinted with the name of the customer or to meet the specific needs of certain customers and which were purchased to fill prior orders and contracts of customers, remained in interstate commerce until delivered to the customer, though temporarily held in the wholesaler's warehouse to await delivery: (b) As to goods purchased from without the State to meet the anticipated needs of customers, but which were not purchased pursuant to a prior order on contract, the interstate journey of these goods ended when they came to rest in the wholesaler's warehouse and that the subsequent handling, sale and delivery of the same were in intrastate commerce and that the employees who handled or sold or delivered these latter goods were not "engaged in commerce" and were not subject to the Fair Labor Standards Act.

The first of these two holdings is relied on by respondent. This holding, however, was not a new one or one of peculiar application to the Fair Labor Standards Act, but followed the principles laid down in *Champlain Realty Co. v. Town of Brattleboro,* 260 U. S. 366 (1922), and earlier decisions of this Court that, as stated in the *Jacksonville Paper Co.* case, once the goods have entered the channels of interstate commerce, "if the halt in the movement of the goods is a convenient intermediate step in the process of getting them into their final destinations, they remain 'in commerce' until they reach those points." Similarly, the second of these two holdings in the *Jacksonville Paper Company* case followed the long standing principle that an interstate journey ends when goods come to rest in the warehouse under no pre-existing orders or contract and for no particular customer.

At the same time as this Court in *Jacksonville Paper Co.* case was following the principles laid down in the earlier cases as to when the interstate journey or commerce ends, there was also existing the principles as to when the interstate journey or commerce began. These latter principles had first been laid down in *Coe* v. *Errol,* 116 U. S. 517 in 1886 and had been consistently followed by this Court without waivering in all subsequent cases including those cited on page 10 of the Petition for Writ of Certiorari. The cases there cited include ones decided by this Court before and after the *Jacksonville Paper* case.

Respondent argues that *Coe* v. *Errol* and the subsequent cases cited, including those under the Federal Employers' Liability Act, as to when an interstate journey or interstate commerce begins, do not apply under the Fair Labor Standards Act. This argument poses this question:

Since, in determining when an interstate journey ends for the purpose of the Fair Labor Standards Act, this

Court has followed the earlier concepts and principles in effect when the Act was passed, should this Court for the purposes of the Act follow the same principles and concept as to when an interstate journey or commerce begins as were in effect at the time the act was passed by Congress or should the Court adopt a new concept and new set of principles as to when an interstate journey or commerce begins?

3. When Congress enacted the Fair Labor Standards Act, the rule laid down in *Coe* v. *Errol* as to when interstate commerce began had consistently been followed by the decisions of this Court (cases cited page 10 of Petition for Certiorari). This fact and respondent's argument raise this question.

Did Congress, in enacting the Fair Labor Standards Act and in providing therein that employees "engaged in commerce" should be subject to the Act intend to have the phrase "in commerce" mean the same as had been attributed to that phrase "in commerce" in other federal acts, and intend to have the same concept and principles apply in determining when interstate commerce ends and when it begins as then existed under the decisions of this Court?

The answer to the question concerning the applicability of the cases decided by this Court under the Federal Employers' Liability Act, prior to the 1939 amendment, is found in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125. In that case this Court said at 131-132:

> "We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the Pedersen and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

(4) Defendant argues that *Coe* v. *Errol*, 116 U. S. 517, and certain subsequent cases, as to when an interstate journey begins, are not applicable as those cases involved the right of the state to tax certain goods within its boundaries (Respondent's Brief, page 9). It is true that *Coe* v. *Errol* involved the right of a state to tax. As there has been considerable general language used in opinions as to the advisability of using tax cases as authority in other fields, it is necessary that we analyze these statements.

It has been said and rightly so that: "Decisions * * * dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the scope of the Act [Fair Labor Standards Act]." *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 132. That is so because in the Fair Labor Standards Act "Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce" (318 U. S. 125, 128). This does not mean that decisions involving the fields in which Congress has legislated by the Fair Labor Standards Act, *i. e.*, interstate commerce and production of goods for interstate commerce, are not applicable.

It is true that tax cases are not always helpful in determining what is in interstate commerce, but it is important to know the reason for this. It is because goods or activities in interstate commerce may be taxed so long as such tax does not place "an unconstitutional burden on interstate commerce." *Kirschbaum* v. *Walling*, 316 U. S. 517, 521.

However, when this court holds that a state may tax certain goods or activities because they are *not* in interstate commerce, because the interstate journey has not begun, as in *Coe* v. *Errol*, that is entirely different from saying that a state can tax goods even if they are in interstate commerce. If the activities of employees or the

goods when handled by such employees are not in interstate commerce because the interstate journey has not commenced, this is equally true whether the question involved is one of taxation or is one as to whether employees are "in commerce" under the Federal Employers' Liability Act or the Fair Labor Standards Act. To our knowledge it has never been held or even hinted by this Court that there are two or more different concepts of what is interstate commerce or when an interstate journey begins or ends, depending on whether a tax, Federal Employers' Liability Act or a Fair Labor Standards Act case is involved.

At least in the cases under the Federal Employers' Liability Act, prior to the 1939 amendment, this Court adopted with approval the principles of *Coe* v. *Errol* as to when an interstate journey begins. *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36; *Bay* v. *Merrill & Ring Logging Co.*, 243 U. S. 40. Later under the Fair Labor Standards Act, this Court adopted and followed its decisions under the Federal Employers' Liability Act as to what the phrase "engaged in commerce" means. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128-130; *McLeod* v. *Threlkeld*, 319 U. S. 491, 495, 498.

II.

The Empty Bottles and Cases Were Not Specifically Marked for an Out-of-State Destination When They Were Picked Up by the Driver-Helpers of Petitioner and Returned to Petitioner's Warehouse. Such Statement in Respondent's Brief Is in Error.

Under "Question Presented" on page 2 of Respondent's Brief it is stated that the beer bottles and cases which the driver-helpers of petitioner pick up from the retailers are "specifically so marked for the out-of-state-destination." The bottles and cases are not so marked.

In the first place these empties have not been invoiced, no bill-of-lading has been issued and no sale of them has been made at the time they are picked up by the driver-helpers from the retailers or when they are returned to petitioner's warehouse. Petitioner is free to dispose of these empties to whomever it chooses or not to dispose of them at all (Rec. 94).

As to the empty returnable bottles, the testimony only is that the helpers picked up brown bottles (Rec. 45, 57, 83). These might have labels on them of any number of different brewers as most brewers use brown bottles, white and green ones being in the minority. Furthermore even if these brown bottles have on them the label of one of the brands handled by petitioner, these are paper labels glued to the bottle. They wash off easily and are always washed off before they are refilled. These bottles can be used by and can be sold to most of the brewers or to other buyers for resale to any number of different users.

Though the cases might have a brewer's name on them, they are cardboard cases with a limited period of re-use. The principal function of the case is to have a package in which to ship the empty bottle. These cases can be sold to and used by any other brewer or manufacturer or other packager. Such other purchaser need only paste a paper label over the brand name printed on the case.

It cannot be said in any sense that when these empty cases and returnable bottles are picked up at the retailer's place of business and returned to petitioner's warehouse that they are marked for an out-of-state-destination.

That the petitioner's intention may be to sell and ship them to one of the out-of-state breweries whose products it sells, does not place these empties in interstate commerce when the driver-helpers pick them up at the retailer's place of business and return them to the wholesaler's

warehouse. "Although intended for exportation they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place outside of the state or committed to the custody of the carrier for transportation to such place, * * *" they remained in intrastate commerce. "The carrying of them in cars or other vehicles * * * to the depot [warehouse] where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation." *Coe* v. *Errol*, 116 U. S. 517, and the other cases cited on page 10 of Petition of Writ for Certiorari.

Conclusion.

It is respectfully submitted that the decision below is erroneous and the questions presented on the record in this case are of such substance and general importance as to necessitate review by this Court.

Respectfully submitted,

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